NO. 85-755

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

****

DELYNDA ANN RICKER BARKER REED, APPELLANT

V.

PRINCESS ANN RICKER CAMPBELL, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF PRINCE RUPERT RICKER, DECEASED, APPELLEE

****

ON APPEAL FROM THE COURT OF APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANT'S REPLY

R. Stephen McNally
P.O. Box 1586
Austin, Texas 78767-1586
(512) 474-1397

COUNSEL OF RECORD FOR APPELLANT
DELYNDA ANN RICKER BARKER REED

APPEAL DOCKETED OCTOBER 15, 1985
PROBABLE JURISDICTION NOTED DECEMBER 9, 1985

QUESTIONS PRESENTED

RETROACTIVITY QUESTIONS:

1. Should Delynda be denied the benefit of the holding of this Court in Trimble v. Gordon under the "time of filing" test applied by the state court below?

2. Should Delynda benefit from the holding of this Court in Trimble v. Gordon under the test of Chevron v. Huson?

3. Should the retroactivity of Trimble be determined by whether the claim was filed in an open estate or as a collateral attack on a closed estate?

LEGITIMATION QUESTION:

4. Does the Fourteenth Amendment require an opportunity for Delynda to legitimate herself equivalent to the statutory procedures arbitrarily denied her?

SEXUAL CLASSIFICATION QUESTIONS:

5. Where maternal heirship requires only a preponderance of the evidence while paternal heirship is not allowed, is the distinction permissible?

6. Was the denial of Delynda's heirship from Prince Ricker justified in light of the jury's unchallenged finding of paternity and the convincing proof at trial?

TABLE OF CONTENTS

II.

III.

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

CASES

OTHER AUTHORITIES

I.

THE TEXAS COURT OF APPEALS ACCEPTED THE JURY'S FINDING THAT DELYNDA IS PRINCE RICKER'S CHILD.

A. THE JURY'S ANSWER TO SPECIAL ISSUE NUMBER ONE ESTABLISHED THAT DELYNDA IS THE CHILD OF PRINCE RICKER.

As explained by the Court of Appeals,[1]

> By their answers to the Special Issues submitted, the jury determined:
>
> 1. The Plaintiff was a child of Prince Ricker. . . .
>
> ([T]he trial) court received the jury's verdict and based thereon entered a take nothing judgment against the Plaintiff.

Paternity is thus the predicate which framed the issues considered by the Court of Appeals[2]:

> Trial was to a jury which found that the Plaintiff was Prince's child but that her mother was never validly married to Prince. We will affirm the judgment of the trial court.

---

1. Reed v. Campbell, 682 S.W.2d 697, 699 (Tex. App. -- El Paso 1984, ref. n.r.e.); Appendix A of the Jurisdictional Statement (J.S.) at p. A.4.

2. (Reed, p. 698; JS A.2).

B. THE ENTIRE REED OPINION DEMONSTRATES ACCEPTANCE OF THE JURY'S FINDING.

Throughout the Reed opinion, the Court of Appeals refers to Prince Ricker as "the father" of Delynda and "her father". (Reed, pp. 699-700; JS A.7-8).

The reasoning of the lower court demonstrates its acceptance of Prince's paternity. It held that she

> would not inherit as a 'recognized' illegitimate child since Section 42(b) of the Probate Code provides the only methods by which an illegitimate child may inherit from her father. Being a 'recognized' illegitimate is not one of them. . . . Johnson v. Meriscal, [620 S.W.2d 905 (Tex. Civ. App. -- Corpus Christi 1981, writ ref'd, n.r.e.)] held to the contrary. . . .

Reed, p. 400; JS A.8. Appellees quote a portion of the discussion of the evidence of "recognition" under Johnson v. Meriscal out of context as showing a holding of "no paternity."

Reed also considered whether Delynda was legitimated by a common-law or putative marriage of Prince Ricker and her mother. If Prince Ricker were not Delynda's father, it would be irrelevant to her heirship whether he married her mother.[1] A portion of the opinion discussing whether Delynda's parents had married was quoted out of context by Appellees as a "no paternity" finding.

---

1. Delynda also asked the lower court to deem her legitimate by construing the marriage found by the jury to fall within the Texas invalid marriage statutes, Family Code 12.02(b) and the last sentence of Probate Code §42. The lower court instead adopted Appellees' position that the meaning of "marriage" in these statutes was so narrow that the bigamous wedding of Prince Ricker and Delynda's mother was "merely meretricious, being no marriage at all" (Reed, p. 698; J.S. p.A.4). This strained construction, in which the Texas Supreme Court held to be "no reversible error", was necessary only because Prince Ricker is Delynda's father.

C. APPELLEES POSITION AT TRIAL, ON APPEAL, AND IN THE TEXAS SUPREME COURT CAUSED EACH TO RENDER JUDGMENT THAT DELYNDA WAS THE ILLEGITIMATE CHILD OF PRINCE RICKER, ESTOPPING APPELLEES TO CLAIM THAT IT WAS ERROR TO ACCEPT DELYNDA AS PRINCE'S NATURAL CHILD.

Appellees asserted at trial,[1] in the Texas Court of Appeals,[2] in the Texas Supreme Court,[3] and before this Court,[4] that the jury finding of paternity has established Prince Ricker as the father of Delynda, but that this is insufficient to allow Delynda to inherit. Because this

---

1. J.A. p.68 (Appellees' Motion for Judgment on the Verdict); J.S. p.A.17 (jury verdict received without objection); J.A. p.77 (Appellees' Response to Motion for Judgement); S.F. V.9, p.3 (Appellees retract objection to paternity evidence as insufficient: "Judge, I don't think that's a good objection.")
2. See "First Amended Brief of Appellee," filed in the Texas Court of Appeals; pp.3-5,13,34-46,47,61,65.
3. See "Answer of Respondent to Application for Writ of Error," filed in the Texas Supreme Court; pp.3,45,46, and 68.
4. Appellees' "Motion to Dismiss or Affirm," filed in this Court, pp.13,14.

position has caused each court below to render its judgment based on the jury verdict of paternity, Appellee is estopped to assert error in that verdict under state[1] and federal[2] law.

D. THE COURT OF APPEALS LACKED JURISDICTION TO DISREGARD THE JURY'S FINDING OF PATERNITY.

An Appellee in Texas must bring a cross-point to challenge unfavorable findings made by the jury or any error therein is waived.[3] Appellee brought no

---

1. Smith v. Chipley, 42 S.W.2d 645 (Tex.Civ.App. 1931, writ refused).

2. Davis v. Wakelee, 156 U.S. 680, 689 (1895).

3. T.R.C.P. 420, Lovejoy v. Lillie, 569 S.W.2d 501, 504-505 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.); Wisdom v. Smith, 209 S.W.2d 164 (Tex. 1948); Jack v. State, 694 S.W.2d 291 (Tex. App.--San Antonio 1985, no writ); Aldrich v. State, 658 S.W.2d 323 (Tex. App.--Tyler 1983, no writ); Jones v. John's Community Hospital, 624 S.W.2d 330 (Tex. App.--Waco 1981, no writ).

such cross-point in her brief before the Court of Appeals.[1]

The case on which Appellees predicate their bold theory of Texas appellate jurisdiction and procedure, Davis v. Jones, 626 S.W.2d 303 (Tex. 1982), did not hold what Appellee claims that it did. That case refused to apply Trimble v. Gordon to its facts because, as it states in plain English:

> The facts of the three Supreme Court cases[2] appeared to play a major role in the decisions. Each dealt with relationships between an alleged father and his child. None dealt with grandparents.

626 S.W.2d 306. The Texas court reasoned that "The problems of first generation illegitimacy are magnified many times when the claim is of second, third, or fourth generation illegitimacy." Id. at 309.

---

1. "First Amended Brief of Appellee," in the Court of Appeals, El Paso, pp.3-5.
2. Labine v. Vincent, Trimble v. Gordon, and Lalli v. Lalli.

The correct standard for the adequacy of the evidence needed to prove paternity in Texas is "preponderance of the evidence."[1] And even if it were not, the error in submitting issues to the jury on the wrong persuasion standard would have been waived where no objection was recorded at trial. T.R.C.P. 274.[2] Appellees made no such objection in this case.[3] Moreover, the remedy for an error of law as to the proper standard of persuasion to submit to the jury would have been, in

---

1. Tex.Fam.Code §11.15, In Interest of J.A.K., 624 S.W.2d 355 (Tex. App.--Corpus Christi 1981, ref. n.r.e.); In Interest of J.J.R., 669 S.W.2d 840, 842 (Tex. App.--Amarillo 1984, no writ); See 1 Ray, Texas Evidence, 3rd Ed., §49, supp. pp. 5-6.

2. Reed v. Israel Nat. Oil Co., 681 S.W.2d 228, 237 (Tex. App.--Houston [1st Dist.] 1984, no writ).

3. See S.F. Vol 9, pp.2-3.

both this case[1] and the Davis case,[2] to remand for trial on the correct standard--not to render the case.

E. THE JURY FINDING WAS SUPPORTED BY CLEAR AND CONVINCING PROOF BEYOND THAT REQUIRED BY THIS COURT IN WEBER.

The proof of paternity in this case far exceeds that needed to support the jury's finding. Appellant's Brief on the Merits summarizes some of this proof at p.7, fn. 1, et. seq. Additional matter germane to contentions of Appellee includes the following:

Prince visited at the hospital after Delynda was born (S.F. 57), chose her name (S.F. 58), and was present and assisted in giving information, including blood-type information, for her birth certificate

---

1. In Re King's Estate, 244 S.W.2d 660, 661 (Tex. 1951).

2. Motsenbocker v. Wyatt, 369 S.W.2d 319, 325 (Tex. 1963).

when it was filled out. (SF p. 58; PE1, O&A p.9)

The certificate showed him as her father, and that her birth was legitimate. (SF 58; P.E.1, O&A p.9)

And he explained to his sister that Delynda was his as much as "Prinnie" or "Muggie" (two of the Appellees). (S.F. 428)

Prince Ricker asked to see his daughter Delynda several times and did see her several times when she was an infant. (S.F. 91)

The evidence of paternity was more than this court found adequate in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). In Weber, a possible proof problem as to the second child was pointed out by the Court. This child was born after the father died. The father never had a chance to acknowledge the

posthumous child or show any awareness of his paternity. Weber found the posthumous child entitled to the same relief as the child that lived with and was cared for by the father.

II.

UNDER THE CORRECT CHEVRON TEST OF NONRETROCTIVITY, TRIMBLE IS BINDING AUTHORITY.

A. DECISIONS OF THIS COURT ARE GENERALLY ACCORDED RETROACTIVE EFFECT.

While retroactive application is not compelled, constitutionally or otherwise, this Court noted in Solem v. Stumes, 104 S.Ct. 1338, 1341 (1984) that

> As a rule, judicial decisions apply "retroactively." * * * Indeed, a legal system based on precedent has a built-in presumption of retroactivity. (cite omitted)

Because retroactivity is presumed, this Court has no cause to cite Chevron v. Huson, 404 U.S. 97 (1971) in applying precedents retroactively. For example, this Court gave Trimble itself retroactive

application, without citing Chevron, in remanding Lalli[1] and Pendleton[2]. Chevron is this Court's test for non-retroactivity. In the seventeen years since Chevron, this Court has cited it only seventeen times. The small number of cases in which this Court has limited the retroactive effect of its own decisions underscores that the lower court should have accorded Trimble greater deference.

B. ATTEMPTS BY LOWER COURTS TO LIMIT THE RETROACTIVE EFFECT OF TRIMBLE MUST BE RESPONSIVE TO CHEVRON.

The discretion of the lower courts to limit decisions of this Court to prospective effect is not unbridled,[3] as implied by Appellees Brief, p. 44.

---

1. Lalli v. Lalli, 439 U.S. 257 (1978).

2. Pendleton v. Pendleton, 431 U.S. 911 (1977)

3. See Appellant's Brief, pp. 25-32.

The "time of filing" test is particularly objectionable when viewed in the context of the amendments to Probate Code §42.[1] These amendments are designed to continue the disinheritance of nonmarital children whose fathers die after Trimble.

---

1. Under state chronological choice of law rules discussed infra, the time test denys heirship where the father died before Trimble, (April 26, 1977), with the sole apparent exception of the claimant in Lovejoy, whose claim was on file when Trimble came down. Lovejoy v. Lillie, 569 S.W.2d 501 (Tex. Civ. App.--Tyler, 1978, writ ref'd, n.r.e.). The 1977 amendment to Probate Code §42 became effective scarcely a month after Trimble and takes over where the "time" test leaves off. It denys heirship to children whose fathers died between May 28, 1977 and August 27, 1979, except for the miniscule subset whose fathers voluntarily recognized them before dying. The 1979 amendment denies heirship to persons whose fathers die after August 27, 1979, unless the child was born after September 1, 1975, and sued to establish heirship rights within twenty years (originally, one year) from their birth, notwithstanding that there is no right to heirship until after the death of the decedent. Additionally, the 1979 §42 possibly denies heirship to such children if they first apply in probate.

The "time" test attempts to continue bastardy disinheritance against those whose fathers died earlier. As part of an overall grudging state response designed to continue the denial of heirship struck down in Trimble, the "time" test is thus especially suspect.

C. THIS COURT NOTED PROBABLE JURISDICTION IN TRIMBLE NINE MONTHS BEFORE PRINCE RICKER'S DEATH, FORESHADOWING THAT BASTARDY-BASED DENIALS OF HEIRSHIP MIGHT BE STRUCK DOWN

On March 22, 1976, this Court noted probable jurisdiction in the case of Trimble v. Gordon, 424 U.S. 964. This was more than nine months prior to Prince Ricker's death. It was over three months before he returned from a course of treatment at Hazelden clinic, to admit to his sister that Delynda was his daughter. (SF 421-429, 449). Competent counsel advising Prince Ricker about the possibility of Delynda inheriting from him would have

realized that this Court would probably reverse the insurmountable barrier in Trimble, because the rule which Trimble applied--that insurmountable barriers based on illegitimacy are void -- was already well established. A contrary decision in Trimble would have significantly modified the earlier cases in which insurmountable barriers had uniformly been struck down.

D. THE PURPOSE OF TRIMBLE WAS FRUSTRATED BY THE REFUSAL TO APPLY ITS ANALYSIS IN PRINCE RICKER'S OPEN ESTATE.

Appellees have yet to answer the question how the "time" rule, which as legislation would be repugnant to the Constitution under Trimble, can further the purposes of Trimble as a rule of retroactivity.

The orderly leasing of mineral property in probate is governed by Probate Code Part 7, "Mineral Leases, Pooling, or

Unitization Agreements, and other matters relating to Mineral Properties"; §§367 - 372. While Probate Code §188 deals generally with persons who contract with an administratrix in good faith, Part 7 makes more specific provisions for the procedure by which a mineral lease may be obtained while the estate is in administration. The practical effect of holding Trimble retroactive will be to accord Delynda the rights which a legitimate child would have under Chapter 7 with respect to the mineral leases.

E. THIS COURT HAS ALREADY RULED THAT THE RESULT REACHED BY THE "TIME OF FILING" TEST IS ILLOGICAL AND UNJUST.

The third element of the Chevron is whether retroactivity would cause or prevent injustice or hardship. The justice of denying heirship to Delynda because of her status of birth presents no question of

first impression. Imposing such disabilities on children because of their status of birth was weighed by this Court and rejected as "illogical and unjust" in Trimble.

Weighing the hardship under Chevron, the economic deprivation to Delynda is compounded by the stigma of illegitimacy which state law imposes on her. Retroactive application of Trimble will remove some of the legal sanctions which still reinforce this stigma.

III.

SUBJECT TO THE REQUIREMENTS OF EQUAL PROTECTION, THE ENACTMENT OF §42 IN FORCE WHEN PRINCE RICKER DIED APPLIES TO HIS ESTATE.

Under Texas law, the lower court was correct in selecting the 1956 enactment of §42 as applicable to the estate of Delynda's father. Because Prince Ricker died in 1976, The 1956 enactment is appli-

cable under the Texas Constitution,[1]

---

1. As this Court noted in Mills v. Habluetzel, 456 U.S. 91, 95 n. 1, (1982), Article I, Section 16 of the Constitution of the State of Texas forbids retroactive laws. Section 16 provides: "No retroactive law shall be made." (Vernon 1984).

   The Texas Constitution's invalidation of retroactive laws is especially sensitive where vested rights are concerned. In Cox v. Schweiker, 684 F.2d 310, 318 (5th Cir., 1982) the court held that applying the amended statute would be an attempt to divest inheritance rights which had vested under Lalli and the pre-amendment statute, and thus "amount to a retroactive interference with vested rights, a result expressly forbidden under Georgia constitutional law."

statues[2], and court decisions.[3]

---

2. The enacting legislation of the amendments provides that they shall be effective, respectively, on May 28, 1977, and August 27, 1979.

   Probate Code §37 provides that when a person died intestate in Texas, all of his estate vests immediately in his heirs at law. Under §37, the 1956 §42, rather than the amendments, applies to estates of decedents dying before 1977. Jones v. Davis, 616 S.W.2d 276, 277 (Tex. App.--1981 Houston [1st Dist.]), rev'd on other grounds; Davis v. Jones, 626 S.W.2d 303 (1982); Ramon v. Califano, 493 F.Supp. 158 (W.D. Tex. 1980).

3. Davis v. Jones, 626 S.W.2d 303, 305 (Tex. 1982) applied the 1956 §42 to the estate of the first decedant, who died in 1960, noting that "before 1977, an illegitimate child could inherit, under the Texas statutes, only from the mother". To the estate of the second decedent, who died in 1978, Davis held the 1977 amendment to apply, reasoning at p. 305:

   > "The legislature, in 1977, amended Section 42 of our Probate Code to provide for alternate methods making children legitimate. The statute was amended again in 1979, but since Warren Sr. died in 1978, we are concerned with the constitutionality of the 1977 statute."

IV.

THE 1977 AND 1979 AMENDMENTS TO §42, IF APPLIED TO DELYNDA'S HEIRSHIP RIGHTS, RETROACTIVELY POSE INSURMOUNTABLE STATUTORY BARRIERS TO HER RIGHTS UNDER TRIMBLE.

The exclusions of the 1977 and 1979 amendments, as applied to Delynda, are insuperable. In its zeal to cabin Trimble, the predominately male legislature drew too narrowly in drafting both the 1977[1] and the 1979[2] amendments. Indeed, it was apparent that the attempted restrictions on Trimble were probably unconstitutional before the legislature enacted them.

The 1977 amendment to Probate Code §42 adopted the voluntary legitimation procedure of the Family Code. As this Court noted in Mills, the voluntary

---

1. Appellant's Brief, pp. 91-93, 95-96.

2. Brief pp. 97,98, 72-91.

legitimation provisions of the 1974 Family Code amendment were a legislative attempt to limit the support right recognized in Gomez. The voluntary procedures were rejected as too confining to deny the Gomez support right in In re: R-- V-- M--, 530 S.W.2d 921, 922-923 (Tex. Civ. App.--Waco 1975, no writ). Despite this, the legislature engrafted the same inadequate voluntary procedure into Probate Code §42 and deprived Trimble of any significant practical effect.

The 1979 amendment to §42(b) gave children born after September 1, 1975, and whose fathers died after August 27, 1979, the right to bring suit within one year of birth to establish heirship. For those accorded access to the one year period the statutory right was more than purely illusory. Still, the practical effect of the 1979 amendment amounts merely to a more

sophisticated attempt to emasculate Trimble. Before its enactment, nonmarital children had Trimble rights under either the 1977 enactment of §42 or, subject to the "time of filing" test, the 1956 enactment. In effect, the 1979 amendment attempted to nullify the right which Trimble had recognized by hampering it with a one-year-from-birth statute of limitations. The 1979 amendment may have conditioned even the one-year period on the survival of the father, although Texas courts have not decided this question.

Applied to Delynda, the most significant factor of the 1979 amendment is that it adopted the Family Code's exclusion of persons born before September 1, 1975. The outright exclusion to those born before September 1975 was recognizable in

1979 as a denial of Equal Protection under the analysis of Trimble itself.

Appellees have argued that the 1979 barrier was surmountable as to Delynda because she could have been accorded an Equal Protection Wynn action against her natural father while he was alive. The Wynn action exists solely because of the insuperable burden to child support struck down in Gomez. An insuperable statutory barrier is not a statutory "reasonable opportunity" for the purposes of Equal Protection. If such circular logic were the rule, the "reasonable opportunity" requirement of Mills would be meaningless.

Two factors peculiar to the Probate context accentuate the unfairness inherent in Chapter 13 as applied to Delynda's heirship rights. First, there was no notice that any probate significance would be accorded a Family Code action before

the 1979 amendment, when Delynda's father was already dead. Second, heirship does not accrue as a substantive right until the death of the decedant. Probate Code §72(a). Texas follows the rule that "no one is heir to the living" and refuses to settle the probate of living persons.

Applying the 1979 statute to deny Delynda's Trimble heirship would violate Due Process, as well as Equal Protection. Delynda's right to inherit from her father vested under the Fourteenth Amendment at the time of his death. That right was a valuable property right[1] which the state could not disturb without affording her notice and an opportunity to be heard.[2]

---

1. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).

2. Boddie v. Connecticut, 401, U.S. 371 (1971).

Prince Ricker died December 22, 1976. (J.A. 6). The 1979 amendment to §42 was enacted when Delynda's father was already dead. Delynda had no notice that the unattainable Family Code action would be required for her heirship at any time that her father was alive. In addition to violating the prohibition of the Texas Constitution against retroactive statutes, such a provision would also deny her Due Process. Assuming that the Family Code requirements become a bar to heirship if not asserted during the father's life, the lack of notice gave Delynda no chance to attempt to comply with its provisions. If the 1979 incorporation of the Chapter 13 action into the Probate Code means that it is avialable after death, Delynda has complied with its sole constitutional requirement. She is thus an heir either

under the statute or by virtue of its invalidity.

V.

DELYNDA'S INTERESTS IN BEING LEGITIMATED AFTER HER FATHER'S DEATH OUTWEIGH STATE INTERESTS IN DENYING SUCH LEGITIMATION.

Delynda's is entitled as a matter of Equal Protection to an order designating Prince Ricker as her father.

A. THE FAMILY CODE AFFORDS SIGNIFICANT LEGITIMATION RIGHTS

A child who falls within Chapter 13 of the Family Code and secures a jury finding of paternity is entitled to such an order as a matter of right. Family Code §13.08(a) provides:

> (a) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is the father of the child, the court shall issue an order designating the alleged father as the father of the child.

The effect of the mandatory order is legitimation. Section 13.09 provides:

> The effect of a decree designating the alleged father as the father of the child is to create the parent-child relationship between the father and the child as if the child were born to the father and mother during marriage.

In addition to child support, the court may award reasonable attorney's fees incurred in the suit. Family Code §13.42(b). Heirship rights are created if the applicable statutory limitations do not prevent them. Probate Code §42(b)(1979); Family Code 12.04(9). Delynda does not seek support, and her heirship rights vest with reference to the 1956 statute, so that neither is in question here.

Delynda has secured a jury verdict that Prince Ricker is her father. (J.A. 63). Unless a valid state classification bars her right to legitimation, she is entitled to relief fully equivalent to that granted by Chapter 13.

B. THE CLASSIFICATIONS EXCLUDING DELYNDA FROM LEGITIMATION WERE INVIDIOUS.

The September 1, 1975 effective date of Chapter 13 has insurmountably barred Delynda from Chapter 13 relief, suit, and it must therefore be set aside under Mills v. Habluetzel.

The retroactive limitations provisions of the Family Code §13.01 either allow Delynda's suit or they are void. When the one-year version of this statute was enacted on September 1, 1975, Delynda was more than one year old When the four-year version was enacted on September 1, 1981, she was more than four years old. And when the twenty-year version of this statute was enacted on June 19, 1983, Delynda was more than twenty years old.[1]

Thus §13.01 either allows Delynda's legitimation in the present action or its

---

1. Delynda was born November 1, 1958. (S.F.57,12)

barrier was insurmountable and void as a matter of both Equal Protection and Due Process. In neither case is it a valid obstacle to Delynda's legitimation.

Delynda's right to legitimation is clearly available not withstanding whether the state courts rule that a Chapter 13 action is available after the father's death. If the statutory action is not barred by death, then Delynda has maintained it here successfully. If not, it is another insurmountable barrier. In either event, the death of Delynda's father is not a constitutional bar to her legitimation. Since there is no valid state classification justifying the availability of Chapter 13 relief to others while it is denied to Delynda, she is entitled to an order designating Prince Ricker as her father.

C. TEXAS HAS NO INTEREST IN ENFORCING THE NAKED STATUS OF ILLEGITIMACY, AND CAN HAVE NO INTEREST IN DENYING A FAMILY CODE ACTION AFTER THE FATHER'S DEATH.

Texas courts have never construed Chapter 13 legitimation as unavailable after the father's death. The statute itself is silent as to whether the action may be maintained after the father's death. See, e.g., In the Interest of B.M.N., 570 S.W.2d 493 (Tex. Civ. App. --Texarkana 1978, no writ). Thus, the state has asserted no interest in enforcing the status of bastardy simply because the father is dead.

Moreover any state interest in enforcing the mere status of bastardy would not be permissible under the decisions of this Court. Delynda's right to Family Code legitimation involves none of the delicate state interests involved in her claim to heirship under §42 of the

Probate Code. The legitimation decree sought in her case would have no bearing on the interest in orderly probate or title to real estate.

This Court has repeatedly rejected the encouragement of legitimate family relations as illogical, unjust, and impermissable. Only the orderly settlement of estates and the prevention of stale or fraudulent claims for support have been found, in Trimble and Pickett, to justify the imposition of statutory burdens based on bastardy. Because Delynda claims no support right, and because her heirship is settled under the 1956 statute without reference to the Family Code, such state interests are lacking in this case.

D. LEGITIMATION, AND THE REASONABLE FEES NECESSARY TO SECURE IT, ARE SUBSTANTIAL RIGHTS.

1. FREEDOM FROM THE STIGMA OF BASTARDY IS A SUBSTANTIAL LIBERTY INTEREST.

As Appellee notes in her brief, at

common law an illegitimate child had no rights of inheritance. "The harsh result was that such a child was considered nullius fillius, the child of nobody." (B.A. p. 46)

The historical discrimination perpetuated by this law can only be interpreted as imputing lesser worth to the illegitimate children. And the denoting of inferiority by law and society can only create within the faultless children themselves a diminution of feelings of self worth. The historic and ongoing social opprobrium attached to the status of illegitimacy has been shown to have an effect on children.[1]

One study has found that illegitimate children, when compared with legitimate children of similar economic status,

---

1. Marcus, "Equal Protection: The Custody of the Illegitimate Child," 11 Journal of Family Law 1, 17-18 (1971).

showed differences in "adjustment," as well as lower IQs and lower scores on the California Test of Personality. The study also found greater differences between the two groups as the children grew older, hypothesizing that the illegitimate children became increasingly aware of their socially inferior status.[1]

It is clear that Delynda was deprived of substantial benefit under Texas' Family Code, Chapter 13 when it granted to illegitimate children a right to sue their natural fathers for legitimation, yet denied it to her.

---

1. Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," 64 American Journal of Sociology 196 (1958).

2. REASONABLE ATTORNEY'S FEES NECESSARY FOR THE LEGITIMATION ACTION ARE A VALUABLE DUE PROCESS AND EQUAL PROTECTION RIGHT.

The Texas Family Code recognizes that "establishment of paternity is the necessary first step in all suits by illegitimate children for support from their natural fathers." Mills v. Habluetzel, 456 U.S. 91, 94 (1982). The 1979 amendment to Probate Code §42 denies heirship to illegitimate children absent such proof of paternity. Legitimate children, by contrast, need prove only maternity and marriage to be accorded the same rights. The Texas statutes impose on illegitimate children the burden of potentially lengthy and costly court proceedings, to which the rights of legitimate children are not subjected. It is appropriate and fitting that the legislature, in Family Code §13.42(b), has made an award of reasonable attorneys fees available to

alleviate some of the potential burden which Texas statutes impose. This award is denied to Delynda by the same classifications as legitimation itself.

This Court has repeatedly held that the right to be heard prior to a deprivation of property under state law is a fundamental Due Process right.[1] Specifically, this Court has held that the right to counsel is required in order to be heard effectively in a suit affecting the parent-child relationship. Lassiter v. Dept. of Social Services of Durham Co., 452 U.S. 18, 31 (1981).[2]

---

1. E.g. Boddie v. Connecticut, 401 U.S. 220 (1971); Matthews v. Eldridge, 424 U.S. 319 (1976). For the proposition that a cause of action for legitimation is a property right, see Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).

2. See also Little v. Streater, 452 U.S. 1, 13 (1981) (right of indigent to costs for blood tests in suit to establish parent-child relationship).

The award of fees under §13.42(b) of the Family Code is discretionary. This case presents strong equitable reasons that the award should be allowed. Delynda has incurred heavy fees which have been necessary and reasonable in carrying this case through trial and three levels of appeal. There has been no question of her paternity ever since the jury rendered its verdict. Appellees have sought to prevent her heirship by avoiding this Court's mandate. The time of filing test has been implicitly acknowledged from the first to be one repugnant to the Fourteenth Amendment, because the issue from the summary judgment stage has been whether Trimble v. Gordon would apply.

Certain illegitimate children are granted the right to a discretionary award of attorneys fees incurred in esablishing their paternity. The same

award is denied to Delynda by Chapter 13. The attorney's fee benefit Delynda has been deprived of is substantial.

E. DELYNDA'S CLAIM IS FACTUALLY AND LEGALLY DISTINCT FROM THE SITUATION PRESENTED IN LALLI V. LALLI.

In Lalli v. Lalli, 439 U.S. 259 (1978), the Court had before it a New York statute which provided the claimant a lifetime action. In the case at hand, Chapter 13 has totally excluded Delynda from bringing any action while her father was alive. Her action was conclusively barred by her date of birth.

The statute in this case is thus like the statute in Trimble v. Gordon, 430 U.S. 762 (1977), rather than the statute in Lalli. The Trimble statute was struck down because it provided only an insuperable barrier to heirship, in that there was no lifetime action which would avail Deta Mona Trimble of heirship. She was

therefore allowed to prove paternity for that purpose after her father's death. Like the Illinois statute in Trimble, the Texas Family Code never provided Delynda a lifetime action.

The statute in Lalli provided clearly that the filiation action could be brought only while the father was alive. In Texas, no similar statutory provision warned Delynda of the need to bring the unavailable paternity claim while her father was alive. Denying Delynda's claim to legitimation would therefore violate Due Process, because she was given no notice of the nonexistent lifetime action, and no opportunity to be heard. Boddie v. Connecticut, 401 U.S. 371 (1971).

In Handley v. Schweiker, 697 S.W.2d 999 (11th Cir. 1981), there was only judicial precedent which required that the action be brought while the father lived. Handley set this precedent aside, noting

that it did not merit the deference reserved for the New York legislative enactment. In the case at hand, there is only the chance that Texas may interpret the ambiguous statute as requiring life-time action. This hypothetically possible future holding does not merit more deference than did the precedent set aside in Handley.

F. THE FINDING OF PATERNITY IN THE PRESENT ACTION ENTITLES DELYNDA TO A DECREE DESIGNATING PRINCE RICKER AS HER FATHER, AND AUTHORIZES AN AWARD OF REASONABLE ATTORNEY'S FEES.

It is not necessary for this Court to construe Family Code Chapter 13 to decide that Delynda is entitled to legitimation. The only possible constructions of the Code which could deny legitimation in this case would be unconstitutional. Thus, regardless of the interpretation which the state courts may later make of the statute, Delynda's right of legitimation is not defeated. This Court is thus fully

authorized to enter its Decree--with the full effect of a Family Code decree--designating Prince Ricker as Delynda's father, and to award Delynda the right to discretionary attorney's fees as prayed. Both legitimation and attorneys fees are valuable, substantial rights and fully within the cognizance of Equal Protection.

VI

DELYNDA HAS STANDING.

Appellees' statement that "the present case involves a class of one" is exaggerated, but irrelevant, because even a small class has standing. Kirchberg v. Feenstra, 101 S.Ct. 1195 (1981).

Delynda has standing to assert her sex discrimination point. Craig v. Boren, 429 U.S. 190 (1977); Lowell v. Kawalski, 405 N.E.2d 135, 139 (Mass. 1980).

REQUEST FOR RELIEF

Appellant requests this Court, pursuant to its authority under 28 U.S.C. 2106, to enter an order, or alternatively to issue a Mandate to the appropriate state court requiring that it issue an order:

1. Granting Appellant's Application for Heirship in her father's estate;

2. Declaring that the Fourteenth Amendment affords Delynda a right to inherit from her father equal to that afforded a legitimate child under the Texas Probate Code;

3. Designating Prince Ricker as Delynda's father as a matter of Equal Protection, with the full effect of the mandatory order provided in §13.08 of the Texas Family Code;

4. Awarding Delynda pre- and post-judgment interest pursuant to Rule 49 of the Rules of this Court, as measured by the trial court under the rule of Cavner v. Quality Control Parking, Inc., 697 S.W.2d 549 (Tex. 1985);

5. Declaring an award of attorney's fees is authorized and should be made to Delynda in an amount to be determined by the trial court, under the Texas Declaratory Judgment Act, V.T.C.A., Civil Practice and Remedies Code §§37.005 and 37.009 and as under Texas Family Code §13.42(b); and

5. Taxing the costs in this matter to Appellee, as provided by Rule 50.2 of the rules of this Court.

Pursuant to 28 U.S.C. 2106, Appellant

prays for such further relief as may be just under the circumstances.

Respectfully submitted,

R. Stephen McNally
Counsel for Appellant
P.O. Box 1586
Austin, Texas 78767-1586
(512) 474-1397

The briefing assistance of James C. Thompson is gratefully acknowledged.

APPENDIX

FROM RECEIPT OF THE VERDICT UNTIL THEIR BRIEF ON THE MERITS IN THIS COURT, APPELLEES HAVE TAKEN THE POSITION THAT DELYNDA IS PRINCE RICKER'S NATURAL, ILLEGITIMATE, CHILD.

Before the case was submitted to the jury, Appellees complained that there was inadequate evidence to support the submission of every special issue except number one. Regarding issue 1 --whether Delynda was Prince Ricker's child -- attorney for Appellees began to dictate an objection that the evidence of paternity was insufficient. Then he stopped, and said (SF V.9, p.3): "Judge, I don't think that's a good objection. We will just forget that objection."

Further, Appellees did not object to the submission of paternity to the jury "by a preponderance of the evidence." Appellees point out in their Answer to the Application for Writ of Error to the Texas Supreme Court, p. 45, 46:

> It is well settled that when an issue is submitted, the parties are put on notice that the jury's answer to the issue submitted will, if supported by the evidence, form the basis for the Court's judgment, and it is the duty of each party to point out the errors in the charge or be held estopped

from thereafter urging them. (cites omitted).

The jury returned its finding that Delynda is the child of Prince Ricker. (J.A. p. 63).

In their trial court response to Delynda's motion for judgment, Appellees stated (J.A. p. 77):

> The finding by the Jury to Special Issue Number 1, that Plaintiff was the child of Prince Rupert Ricker, merely establishes Plaintiff as the illegitimate child of Prince Rupert Ricker.

In their First Amended Brief in the El Paso court of appeals, Apellees stated their Reply Point No. 2 as follows (p. 47):

> THE TRIAL COURT CORRECTLY GRANTED JUDGMENT FOR APPELLEE, BECAUSE THE MERE FINDING THE APPELLANT WAS THE CHILD OF PRINCE RICKER DOES NOT ESTABLISH HER LEGITIMACY OR ENTITLE HER TO INHERIT, AND HER RIGHTS HAVE NOT BEEN ABROGATED BY ANY STATUTE OR DOCTRINE OF EQUAL PROTECTION; AND, IN ANY EVENT, APPELLANT'S CLAIM FOR PATERNITY IS BARRED BY THE FOUR YEAR STATUTE OF LIMITATIONS.

At p. 13 of their Amended Brief in

the El Paso appeals court, Appellees stated:

> Thus, our contention is that any relationship that may have existed between Prince Ricker and Annabel Boutwell was merely meretricious and no marriage at all.
>
> That being the case, the jury's answers leave but one conclusion, and that is that Appellant was an illegitimate child.

In their briefs in the court below, Appellees did not present nor brief evidence points challenging the first three findings: Delynda is Prince Ricker's child, Prince Ricker ceremonially married Delynda's mother eleven months before Delynda was born, and then agreed with Delynda's mother to be her husband.

Rule 420 Tex.R.Civ.Proc., provides:

> [I]n case the appellee desires to complain of any ruling or action of the trial court, his brief in regard to such matters shall follow substantially the form of the brief for appellant.

Rule 418(d) begins:

> (d) Points of error. A statement of the points upon which the appeal is predicated shall be stated in short form without argument and be separately numbered.

The rules are still more specific where the jury's charge is challenged, as by Appellees' assertion that a non-preponderance standard of proof should have been applied. Rule 418(e) requires:

> * * * If complaint is made of any part of the charge given or refused, such part of the charge shall be set out in full. * * *

As Appellees urged in their answer to Delynda's Application for Writ of Error to the Texas Supreme Court, p. 99:

> Rule 418(e) of the Texas Rules of Civil Procedure requires that the points of error upon which Petitioner relies be briefed, containing a fair statement of the facts relevant to the point of error and a discussion of the facts and authorities relied upon to maintain the point in issue. And, it has long been an established rule of appellate procedure that assignments of error not briefed are waived. (cites omitted)

Appellees' failure to present and brief evidence points assailing the first three findings deprived the lower court of jurisdiction to hear re-argument of the facts. The court of appeals was thus

without jurisdiction to reject the finding of paternity. Lovejoy v. Lillie, 569 S.W.2d 501, 504-505 (Tex. Civ. App.--Tyler 1978, writ ref'd). In Lovejoy, the appellee failed to present an evidence point in his brief contesting the trial finding of paternity, and was held to have waived any challenge on appeal. The Lovejoy claimant inherited under Trimble.

Appellees' answer to Delynda's Application for Writ of Error to the Texas Supreme C[illegible]'s similarly inconsistent with the current "no paternity" position. Reply Point 5 states:

> THE COURT OF APPEALS CORRECTLY FOUND PETITIONER TO BE ILLEGITIMATE BECAUSE THE MERE FINDING THAT PETITIONER WAS THE CHILD OF PRINCE RICKER DOES NOT ESTABLISH HER LEGITIMACY OR RIGHT OT INHERIT.

On p. 68, Appellees amplified:

> The Jury's finding that Petitioner was the child of Prince Ricker in no way determines the issue of whether Petitioner was the legitimate or illegitimate child of Prince Ricker or whether Prince Ricker recognized Petitioner as his child.

Five of Appellees' nine Reply Points in the Texas Supreme Court answer began with the words: THE COURT OF APPEALS CORRECTLY FOUND PETITIONER TO BE ILLEGITIMATE BECAUSE. . .

Significantly, these arguments, which were made after the alleged finding of "no

paternity" by the appeals court, cannot be reconciled with it. Instead, Appellees' answer in the Texas Supreme Court affirms that the court of appeals found Delynda the "illegitimate," ergo natural, child of Prince Ricker.

Even Appellees' Motion to Dismiss or Affirm in this Court, at p.13, part III., restates without comment the jury's finding that "Appellant was the child of Prince Ricker, Deceased." In reviewing the "Holdings of the Court Below" (part IV, p. 14), Appellees' Motion to Dismiss or Affirm contains no hint of an alleged finding of "no paternity." Instead, the motion summarizes with substantial accuracy what the lower court actually did: it affirmed the judgment of the trial court that Delynda was "illegitimate and incapable of inheriting from the intestate estate of Prince Ricker, Deceased," by holding the Mexican marriage was void and did not ripen into a common law or putative marriage, and that Delynda was not a "recognized" illegitimate, and that recognition (which is not in Section 42(b) of the Probate Code), is not a method by which an illegitimate child can inherit. It held that Trimble would not be applied retroactively to the applicable 1977 Section 42(b), and that even if she could claim under the amendment, a "rational state basis supports that legislation."

The same language was interpreted inconsistently by Appellees. In their Motion to Dismiss or Affirm, it was a finding Delynda was not a "recognized" illegitimate, and that the marriage of her parents did not ripen into a common law or

putative marriage. In Appellees' Brief on the Merits the same language was quoted out of context to support an attempt to re-argue the fact of paternity. The quoted words must be viewed in their context in the lower court's opinion itself. The language quoted is shown by its context to be a response to Delynda's points urging that the evidence established that Prince Ricker recognized the fact that he was her father, and urging that the evidence established a common law or putative marriage of her parents.